

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR -5 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0346
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TIMOTHY SHANE DICKEY,)	the Supreme Court
)	
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201102827

Honorable Boyd T. Johnson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Timothy Dickey was convicted of possession of a dangerous drug for sale, transportation of a dangerous drug for sale, and possession of drug paraphernalia. On appeal, Dickey argues the trial court erred by not suppressing statements he made before and after his arrest. Because we find no error, we affirm.

Factual and Procedural Background

¶2 In reviewing the trial court's denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing and we view that evidence in the light most favorable to sustaining the court's ruling. *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). Officer Jesse Guilin of the Florence Police Department arrested Dickey during a traffic stop and took him to the police station. Once there, Guilin read Dickey warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and interrogated him. During the interview, Dickey admitted to having used methamphetamine six hours previously. Guilin eventually stopped the interview because Dickey appeared sleepy and had difficulty concentrating.

¶3 Dickey was charged with and convicted of possession of a dangerous drug for sale, transportation of a dangerous drug for sale, and possession of drug paraphernalia. He was sentenced to concurrent, presumptive prison terms of ten years, 15.75 years, and 3.75 years, respectively. Dickey appeals from his convictions and sentences. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 13-4033(A)(1).

Motion to Suppress

¶4 Dickey argues the trial court erred in denying his motion to suppress his pre-arrest statements either as involuntary or for lack of a *Miranda* warning and his post-arrest statement because it was involuntary. We review the denial of a motion to suppress for an abuse of discretion. *State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009).

Pre-Arrest Statement

¶5 Dickey argues that his “pre-arrest” statements were involuntary or obtained in violation of *Miranda* and should have been suppressed. We review a trial court’s determination of voluntariness for “clear and manifest error.” *See State v. Hall*, 120 Ariz. 454, 456, 586 P.2d 1266, 1268 (1978). Whether a defendant’s statement was obtained in violation of *Miranda* is a legal conclusion that we review de novo. *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). Dickey does not specify to which statements he is referring. However, the only statements he made prior to his arrest were the admission of owning a pipe and claiming ownership of various items in the bed of the truck.

¶6 As to the statement regarding the pipe, the state agreed not to introduce it at trial, and the court essentially ordered its preclusion unless Dickey opened the door to it through his own questioning. The state followed through on its promise and did not introduce Dickey’s statement regarding the pipe. Accordingly, even if the court had erred in not suppressing the statement, any error would have been harmless. *See State v. Montes*, 136 Ariz. 491, 497, 667 P.2d 191, 197 (1983) (statements obtained without benefit of *Miranda* warning subject to harmless error review).

¶7 It is not clear from Dickey’s opening brief whether he is arguing that his pre-arrest statement of ownership of the items in the truck should have been suppressed. Dickey asserts that he was “questioned without the benefit of *Miranda* warnings upon the discovery of the contraband.” But Dickey claimed ownership of the items before any

contraband was discovered. Nevertheless, the state addressed Dickey's statement of ownership in its brief, and so we will address it.

¶8 Guilin asked who owned the items in the truck during a roadside investigatory stop before he had reasonable grounds to believe Dickey had committed a crime, and therefore Dickey was not in custody and *Miranda* warnings were not required. *See State v. Pettit*, 194 Ariz. 192, ¶ 15, 979 P.2d 5, 8 (App. 1998). Furthermore, the state established that the statement was voluntary through Guilin's testimony that Dickey was not coerced, threatened, or given any promises, which Dickey did not rebut. *See State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). Accordingly, no error occurred. *See Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d at 532.

Post-Arrest Statement

¶9 Dickey next argues the court erred by not suppressing his post-arrest statement that he had used methamphetamine because it was involuntary. We review a trial court's determination of voluntariness for "clear and manifest error." *See Hall*, 120 Ariz. at 456, 586 P.2d at 1268.

¶10 A confession is involuntary if, under the totality of the circumstances, the will of the defendant was overborne. *Id.* Confessions are presumed to be involuntary and the state must show voluntariness by a preponderance of the evidence. *Id.* "A prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty." *Jerousek*, 121 Ariz. at 424, 590 P.2d at 1370.

¶11 At the hearing on the motion to suppress, Guilin testified he neither coerced Dickey nor made threats or promises to him. Dickey seems to attempt to rebut the state's prima facie case for voluntariness with evidence that he was too sleepy to make a coherent statement. But interrogation of sleepy persons does not render their statements involuntary per se. *See State v. Scott*, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993); *State v. Amaya-Ruiz*, 166 Ariz. 152, 164-65, 800 P.2d 1260, 1272-73 (1990). Dickey never asked to be allowed to sleep. *See Scott*, 177 Ariz. at 136, 865 P.2d at 797. And Guilin discontinued the interrogation when he noticed that Dickey seemed too sleepy to continue. Under these circumstances, we cannot say the trial court erred in denying Dickey's motion to suppress his post-arrest statement for lack of voluntariness. *See Hall*, 120 Ariz. at 456, 586 P.2d at 1268.

¶12 Finally, Dickey asserts that his post-arrest statement should have been suppressed because it was the result of the earlier illegal questioning. Dickey failed to present this objection below, and we therefore review only for fundamental, prejudicial error. *See State v. Cota*, 229 Ariz. 136, ¶ 22, 272 P.3d 1027, 1035, *cert. denied*, ___ U.S. ___, 133 S. Ct. 107 (2012). Because Dickey does not argue on appeal that the error was fundamental, and because we find no such error, he has waived this argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (not arguing fundamental error on appeal waives argument); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Conclusion

¶13 For the foregoing reasons, we affirm Dickey's convictions and sentences.

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

/s/ *Michael Miller*

MICHAEL MILLER, Judge